Supreme Court, U.S.
FILED
JAN 17 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-935

OSCAR CHASON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Oscar Chason, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the court of appeals (App. A, *infra*, pp. 1a-10a) is not yet officially reported. The order of the court of appeals denying rehearing (App. B, *infra*, pp. 11a-12a) is not officially reported.

Jurisdiction

The judgment of the court of appeals was entered on November 12, 1971. Timely application for rehearing was filed on November 23, 1971 and denied on December 20, 1971.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

I. Right to counsel—due process—fair trial.

Two months before the trial of this case petitioner Oscar Chason's attorney, Edmund A. Rosner, was himself indicted in the Southern District of New York on charges of suborning perjury in a narcotics trial in which Mr. Rosner had appeared for the defense (Indictment 70 CR. 1030, filed S.D.N.Y., December 8, 1970).

Neither Mr. Rosner nor the United States Attorney disclosed to either petitioner or the trial judge that defense counsel was under indictment and awaiting trial by the same United States Attorney prosecuting petitioner Chason. Thus, questions arise:

1. Whether defense counsel's *undisclosed conflict of interest*, occasioned by an understandable concern for the effect of too vigorous a defense of petitioner upon his own position as a defendant, denied petitioner his right to have the effective assistance of counsel guaranteed by the Sixth Amendment?

2. Whether fundamental fairness and the due process principles embodied in *Brady* v. *Maryland*, 373 U.S. 83 and *Berger* v. *United States*, 295 U.S. 78, required the United States Attorney to make

known to the trial judge and petitioner the pending indictment against defense counsel so that the court could determine whether petitioner wished to change counsel in light of this disclosure?

3. Whether the United States Attorney's silence deprived petitioner of meaningful exercise of his constitutional and statutory right to have counsel *of his own choosing*, free of any possible conflict of interest or impediment to effective representation?

4. Whether, in a constitutional sense, petitioner went to trial "unrepresented", since defense counsel's concealment of his pending indictment precluded petitioner's knowledgeable assent to Mr. Rosner's further participation?

II. Harmless error rule—applicability to the exculsion of evidence.

The court of appeals in this case has found that the *exclusion* of the only disinterested testimony bearing on the "crucial issue of [petitioner's] good faith" (App. A, *infra*, pp. 7a-8a) was error. The court has concluded, however, that the evidence "would have been of slight help" to petitioner and that "the error was harmless" (App. A, *infra*, p. 10a).

Thus far, this Court has had occasion to consider the doctrine of "harmless error" only in cases involving the erroneous *admission* of evidence. See, *e.g.*, *Harrington* v. *California*, 395 U.S. 250; *Chapman* v. *California*, 386 U.S. 18 and *Kotteakos* v. *United States*, 328 U.S. 750. Thus, the question arises:

Whether the erroneous *exclusion* of testimony on a "crucial issue" going to the heart of the defense in a criminal jury trial can ever be excused as "harmless error"?

III. Aiding and abetting — vicarious liability — due process.

The case at bar is factually distinguishable from every other credit-card mail fraud case in that it was neither claimed nor proven that petitioner used the credit cards involved. Indeed, the government never showed who actually did use the credit cards.

All that has been shown is that petitioner possessed and sold airline tickets purchased with stolen credit cards. No connection was ever established between petitioner and any scheme to defraud. Moreover, the prosecutor withdrew the conspiracy count prior to trial, representing that "the government won't offer any evidence on the conspiracy charge". Yet, the court of appeals has affirmed petitioner's conviction as an aider and abettor of unidentified participants in a mail fraud scheme to which he has not been connected. Thus, the question arises:

Whether, in the absence of conspiracy, an individual's unexplained possession and sale of stolen property is sufficient under *Nye & Nissen* v. *United States*, 336 U.S. 613, to establish his guilt of the principal offense on the theory of aiding and abetting?

Statutes Involved

The pertinent provisions of the mail fraud statute, 18 U.S.C. §§1341 and 1342 are set forth in Appendix C (*infra*, pp. 13a-14a).

Statement

On April 14, 1970, petitioner and four named co-defendants were indicted and charged with conspiracy to violate the mail fraud statute, 18 U.S.C. §§1341-1342, and with 41 substantive violations thereof (3a-13a).*

Petitioner was tried separately (2a) on 10 of the substantive counts; the rest were withdrawn (115a-116a) and dismissed on motion (2a). Petitioner was not tried for conspiracy. That count of the indictment was withdrawn and dismissed prior to trial and when the prosecutor represented to the court that "the government won't offer any evidence on the conspiracy charge", but would proceed only on the substantive case (Minutes, Motion to Suppress, p. 66).

The government's proof

The mailings which formed the basis of the 10 substantive counts of mail fraud of which petitioner stands convicted consisted of invoices for airline tickets sent by various airline companies to Diner's Club and American Express, and checks from those organizations to the respective airlines.

Petitioner did not mail anything.

Viewing the evidence in the light most favorable to the government, it was shown that at the time of his arrest

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* Numerical references in parentheses refer to pages of the Appendix submitted to the court of appeals.

petitioner had in his possession 12 airline tickets (Exh. 6-17) issued in the names of other individuals, which were purchased on credit cards that had been reported either lost or stolen (32a-33a, 36a-37a). It further appeared that petitioner had sold, *without profit* (131a-132a), several such tickets for approximately one-half their face value to various persons, including several attorneys and some business acquaintances and customers (38a-39a, 50a-51a, 58a) with whom petitioner sought to establish "good will" (131a-132a).

This was the government's entire case with respect to petitioner's alleged violation of the mail fraud statute.

The prosecution's *theory*, as stated in the conspiracy count of the indictment (3a-6a), *upon which it did not proceed against petitioner* (2a), was far more elaborate than the *proof*.

Thus, the indictment charges that defendants Elmer Dudley and Richard Carlee would obtain stolen credit cards (4a), and that they would "furnish directly and indirectly said airline tickets" to petitioner and the other named defendants (4a) who would use these tickets and sell them for approximately one-half of their face value (5a). The co-defendants were also charged with assuming false names in furtherance of the alleged scheme (5a).*

The proof offered at trial against petitioner Chason differs markedly from these charges.

There was neither claim nor proof that petitioner stole or caused the credit cards involved herein to be stolen.

There was neither claim nor proof that petitioner ever saw, possessed or used the credit cards.

There was neither claim nor proof that petitioner purchased, or caused to be purchased, the airline tickets involved herein.

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* No proof was offered as to the activities of the co-defendants. They were not shown to have been connected to the alleged scheme or to have participated therein in any way.

The government offered no proof connecting the tickets that petitioner sold or had in his possession with co-defendants Dudley and Carlee.

The government offered no proof that petitioner knew that those tickets had been purchased on lost or stolen credit cards.

The government offered no proof that petitioner had ever assumed a false name.

And thus, there was neither claim nor proof that petitioner caused the consequent "mailings" (i.e., invoices and checks in payment thereof) which are the essential elements of the substantive offenses with which he stands convicted.

At the end of the government's case, petitioner moved for a judgment of acquitfal (118a). In view of the foregoing deficiencies in the government's proof we submit it was error for the trial court to deny the motion.

The defense

Testifying in his own behalf, petitioner, a fur dealer whose place of business has been located at 370 Seventh Avenue, Manhattan, for approximately 35 years (127a-128a), gave the following explanation of how he came into possession of the airline tickets that he passed along, *without profit* (131a-132a), to his friends, business acquaintances and customers:

Petitioner has been a resident of New York City for all of his 63 years, although for the last 12 years he has also maintained a home in Miami Beach, Florida, to which he would make between 25 and 30 airplane trips each year (127a-128a). He had standing reservations with and was well known to the airlines (129a). Petitioner was, therefore, interested when, a few years ago, one of his customers told him that he knew a Ken De-

Wald who "had good connections where he could get me some airline tickets at a discount" (129a-130a).

DeWald came to petitioner's place of business, introduced himself, and said that he was able to get airline tickets from two sources. One was salesmen with credit cards who needed cash and would buy airline tickets and sell them at less than face value, thereby having the use of the cash until such later date as they were required to pay their bill (130a, 146a). DeWald's other source was brokers or advertising agencies that the airlines would pay in part with airline tickets for radio and television advertising (130a, 133a, 142a-145a).

Petitioner testified that he paid DeWald between 50 and 60 per cent of the face amount of the tickets (131a). He used some of the tickets himself, and he also "had a lot of customers who for good will I would supply, give them to them, on the same basis as I bought them . ... I would get what I paid . . . whatever it cost me I would give it to them for" (131a). Petitioner denied making money on any of these transactions, and the government offered no proof to the contrary (132a).

Petitioner further testified that he had no idea that the tickets had been purchased with stolen or lost credit cards (131a-132a). DeWald assured him "that the tickets were just the way he said, that they were bought, and that there was nothing wrong with them" (153a). He assured petitioner "that they were all right" (158a).

A crucial element of the defense was the testimony of Moe Gordon, a fur manufacturer who had been purchasing skins from petitioner for approximately 12 years (122a). Mr. Gordon testified that about three years ago he was in petitioner's office when he overheard a conversation between petitioner and DeWald concerning airline tickets (122a). When Mr. Gordon was asked

to relate the circumstances of the conversation he overheard, the prosecutor objected to any conversation as being *hearsay*" (122a-123a). The trial judge sustained the objection (124a).

The court of appeals found that the exclusion of this disinterested testimony bearing on the "crucial issue of good faith" was error. It concluded, however, that the evidence "would have been of slight help" to petitioner and that "the error was harmless" (App. A, *infra*, p. 10a).

REASONS FOR GRANTING THE WRIT

I. Petitioner was deprived of his right to the effective assistance of counsel because of his attorney's undisclosed conflict of interest.

Two months before the trial in this case, Mr. Chason's trial attorney, Edmund Rosner, was himself indicted for subornation of perjury and conspiracy in connection with a prior narcotics trial in which Mr. Rosner appeared for the defense. This indictment of Mr. Chason's lawyer was obtained and would be tried by the very same prosecuting office which proceeded against Mr. Chason herein.

The prosecutor proceeded to trial in this case without disclosing these facts to either the trial judge or petitioner.

Consequently, the trial judge was not given the opportunity to determine whether Mr. Chason wished to change his counsel in light of this disclosure. And, Mr. Chason was deprived of the opportunity to decide whether these facts presented his lawyer with a conflict of interest barring effective representation, or whether he wished to discharge him simply because Mr. Rosner had been indicted for suborning perjury in the defense of another in this same Court.

The prosecutor's silence deprived petitioner of the right to make this vital decision and resulted in his proceeding to trial with an attorney so preoccupied with his own problems that he was unable to give the "undivided allegiance and faithful, devoted service to a client [that] are prized traditions of the American Lawyer" (*Von Moltke* v. *Gillies*, 332 U. S. 708, 725-726). Indeed, his representation of petitioner was nothing more than "hollow compliance with the mandate of the Constitution" (*Von Moltke* v. *Gillies, supra* at 723).*

The federal courts have uniformly reversed or vacated convictions where it appeared that the accused might have been deprived of effective representation because his attorney was in a conflict of interest. (See, e.g., *Porter* v. *United States*, 298 F. 2d 461 (5th Cir.); *Tucker* v. *United States*, 235 F. 2d 238 (9th Cir.); *Craig* v. *United States*, 217 F. 2d 355 (6th Cir.); *Wright* v. *Johnston*, 77 F. Supp. 687 (N. D. Cal.). This is such a case.

While the court of appeals did not consider this contention worthy of comment in its decision, we believe that the defendant's right to counsel of his own choosing is so fundamental that this case should be reviewed by this Court and a rule promulgated requiring, at least, that the prosecutor advise the trial judge of any pending indictments against defendant's lawyer so that the district judge can determine whether defendant wishes to change counsel in light of this disclosure.

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* At pages 22-26 of petitioner's brief to the court of appeals, we set forth in detail the many ways in which Mr. Rosner's "Janus-faced" representation of Mr. Chason severely disabled petitioner.

II. This Court should not sanction application of the harmless error doctrine in the case of exclusion of disinterested testimony, vital to the defense, on the "crucial" issue in a criminal jury trial.

A specific intent to defraud is an essential element of the statutory crime of mail fraud (*Parr* v. *United States*, 363 U. S. 370, 390; *Henderson* v. *United States*, 425 F. 2d 134, 141 (5th Cir.). Petitioner denied that he acted with such intent and this was the key issue in dispute or, as the trial court charged the jury, the "real hard core of the controversy" (187a).

The court of appeals in this case has found that the *exclusion* of the only disinterested testimony bearing on the "crucial issue of [petitioner's] good faith" (App. A, *infra*, pp. 7a-8a) was error. The court concluded, however, that the evidence "would have been of slight help" to petitioner and that "the error was harmless" (App. A, *infra*, p. 10a).

The court of appeals suggests that the excluded testimony would merely have been cumulative, stating that "it is quite possible on the basis of Chason's own testimony, that the jury already believed that he had heard the story from DeWald but then chose to give it little weight in light of the other evidence."

It is far more likely that the jury gave little weight to petitioner's testimony because of the following instruction it received from the trial judge (191a):

> "The defendant here has testified. You must determine how credible his testimony is. Obviously, he has a deep interest in the result of the case. It is fair to say he has the greatest stake in its outcome. Interest creates a motive for false testimony.

> The greater the interest, the stronger the motive, and a defendant's interest in the result of the trial is of a character possessed by no other witness.
>
> In appraising the defendant's credibility, you may take that into consideration."

In view of this charge, how can it be said "beyond a reasonable doubt" that the testimony of a disinterested witness on an issue going to the heart of the defense would not have had some impact upon the jurors?

It "is not the appellate court's function to determine guilt or innocence" (*Kotteakos* v. *United States*, 328 U.S. 750, 763). Who can say with any degree of assurance that the testimony of a disinterested witness would not have sufficed to persuade at least one or more of the jurors to vote for an acquittal? Judges do not share the historic power of a jury to insure lenity (*United States* v. *Maybury*, 274 F.2d 899, 902-903 (2d Cir.)) and they should be loathe to decree that no juror could have been affected by the proffered testimony, particularly in view of this Court's observation that the jury has the power to bring in a verdict in the teeth of both law and facts" (*Horning* v. *District of Columbia*, 254 U.S. 135, 138).

The court of appeals also stated that strong evidence of guilt and "the lack of a strong defense" are factors to be considered (p. 473). How could petitioner mount a "strong defense" when the only disinterested testimony bearing on "the crucial issue of good faith" was improperly excluded?

The cases cited by the court of appeals (App. A, *infra*, pp. 7a-8a) do not support the finding of harmless error. None involved the *exclusion* of key testimony. Thus,

Chapman, *Nasta* and *Satz* each dealt with error in the prosecutor's summation, while *Harrington* and *Tucker* involved the erroneous admission of a confession.

A different rule applies to cases such as this where evidence has been *excluded*. (See, *e.g.*, *Dearing* v. *United States*, 167 F.2d 310, 313 (10th Cir.); *United States* v. *Schultz*, 235 F.2d 684, 685 (7th Cir.); *Evans* v. *United States*, 277 F.2d 354 (D.C. Cir.)*.

The rule to be applied in this case is that stated in *Clapper* v. *Race*, 121 N. Y. Supp. 317, 319, as follows:

> "In a case where illegal evidence has been admitted, it will be scrutinized carefully for the purpose of ascertaining whether it may have affected the result; but in case of the rejection of legal and proper evidence a different rule prevails, for the reason that *a court is not in a position to determine what effect the rejected evidence may have had on the result, or the lack of it, in the minds of the jurors.* The rejection, therefore, of legal and competent evidence, *is necessarily a fatal objection on appeal.*" (Emphasis added.)

* Our research has disclosed only rare instances in which the harmless error doctrine has been applied to cure the *exclusion* of relevant evidence. And the common denominator in each of those cases has been the admission of other evidence that could fairly be found to have been the equivalent of that which was kept from the jury. Thus, in *United States* v. *Hall*, 200 F. 2d 957, 958 (2d Cir.), the court held that it was harmless error to have excluded a business record where the witness was permitted to read the record to the jury during his testimony. Similarly, in *Warden* v. *United States*, 391 F. 2d 747 (10th Cir.), the exclusion of a defendant's statement bearing upon his state of mind was considered harmless where another witness was allowed to testify to the same effect.

Finally, the court of appeals pointed to alleged inconsistencies in Chason's testimony as a ground for concluding that the jury would not have believed the defense. In this connection we say, in the words of the court in *Evans* v. *United States*, 277 F. 2d 354, 356 (D. C. Cir.), that "the proffered evidence might have led the jury to believe that statement, notwithstanding its apparent doubts as to appellant's credibility on other phases of [his] testimony."

We submit that as a matter of law, logic and justice, the erroneous exclusion of testimony on a "crucial issue" going to the heart of the defense in a criminal jury trial, cannot be "harmless error". The question presented is a substantial one, having an effect upon the integrity of the judicial process, and merits the consideration of this Court.

III. This Court should not sanction a rule that, absent proof of conspiracy, an individual's unexplained possession and sale of stolen property is sufficient under *Nye & Nissen* v. *United States*, 336 U. S. 613 to establish his guilt of the principal offense on the theory of aiding and abetting.

(a)

The case at bar is factually distinguishable from every other credit-card-mail-fraud case that our research has disclosed, in that it was neither claimed nor proven that petitioner actually used the credit card thereby initiating the commercial process that culminated in use of the mails by airlines and credit organizations.

In *United States* v. *Thomas*, 429 F. 2d 407 (5th Cir.), the defendant's conviction of mail fraud was affirmed

where it appeared that he personally made unauthorized use of a Standard Oil credit card to obtain gas station products and services.

Similarly, in *United States* v. *Reynolds*, 421 F. 2d 178 (5th Cir.), defendant made unauthorized use of a gasoline company credit card stamped with the name of another during the course of his cross-country travels.

Adams v. *United States*, 312 F. 2d 137 (5th Cir.), and *Kloian* v. *United States*, 349 F. 2d 291 (5th Cir), *cert. den.*, 384 U. S. 913, are cases where the defendants were shown to have devised schemes to defraud oil companies and actually used other persons' credit cards to make unauthorized purchases, passing themselves off as the credit card owners.

In *United States* v. *Kellerman*, 431 F. 2d 319 (2d Cir.), *cert. den.*, 450 U. S. 957, defendants' convictions for conspiracy to violate the mail fraud statute and substantive violations thereof were affirmed where the conspiracy was to sell and distribute counterfeit Diner's Club credit cards and the evidence clearly established each defendant's knowing participation in the conspiracy.

As noted above, in the instant case the government elected not to proceed and offered no evidence on the conspiracy count.

Finally, in *United States* v. *Kelem*, 416 F. 2d 346 (9th Cir.); *cert. den.*, 397 U. S. 952, defendant operated a discount store where he sold all types of merchandise, including airline tickets at 85 per cent of their face value. Defendant's customers believed that these discounts were made possible through supposed "due bill trades" under which airlines provided transportation in exchange for radio and television advertising. In fact, upon learning of a customer's transportation needs, Kelem would have

one of his associates purchase a ticket on a credit card issued in the associates' name. These associates would sell the tickets acquired on credit to Kelem for 60 per cent of their face value; they did not, and never intended to, pay the subsequently rendered bills. As each associate's credit card was confiscated because of large, unpaid balances, defendant would recruit others to aid him in his scheme.

It was in view of these extreme circumstances that the Ninth Circuit affirmed the conviction for mail fraud, although pointing out, at page 350, that:

> "We hope we have made it clear that the decision to which we are driven by the facts in this case cannot, under *Parr*, be construed as establishing the general proposition that perpetrators of all credit card frauds are amenable to federal prosecution under Section 1341. Indeed, absent further Congressional action which might require a different outlook, we think it would be wise for federal authorities, in credit card fraud cases, to defer to the application of the criminal law processes of the states."

(b)

The court of appeals apparently misconceived the thrust of petitioner's argument that the evidence was insufficient to establish *his* violation of the mail fraud statute, 18 U.S.C. §1341.

Petitioner did *not* contend, as an abstract proposition of law, that a scheme involving the fraudulent use of credit cards is beyond the reach of the mail fraud statute. Neither did he allege, as the court of appeals has incorrectly stated (App. A., *infra*, p. 3a), that once the tickets

were procured by the improper use of the credit cards, the subsequent invoice and check mailings "had no part in the fraud scheme itself."

Petitioner did not dispute, and indeed would concede, that the success of such a scheme depends upon use of the mails. Nonetheless, the court of appeals devoted more than three and a half pages of its opinion to this basic proposition, making it appear as though petitioner had argued to the contrary. In fact, he did not.

Petitioner's contention was that the prosecution had not shown *his* connection to any such scheme. Thus, he urged:

> "While the prosecution's *theory* may have embraced a conspiracy or scheme, the record contains no proof in support thereof." (Applt's Reply Brief, p. 2)
>
> "Here, however, there is *no proof* of Mr. Chason's *connection* with the alleged scheme; no proof of concert of action; no proof of a criminal joint venture." (*Id.*, p. 3)

In contrast to the three and a half pages devoted by the court of appeals to refuting a a contention not raised by petitioner with regard to the existence of a scheme, his actual claim—that there is no proof connecting him to that scheme—was brushed aside by the court in a brief footnote declaring that "there was sufficient to convict the appellant as an aider and abettor under 18 U.S.C. §2 . . ." (App. A, *infra*, p. 2a).

In *Nye & Nissen* v. *United States*, 336 U. S. 613, 619, this Court stated:

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he par-

ticipate in it as in something that he wishes to bring about, that he seek by his own action to make it succeed.'"

For petitioner to be found guilty of aiding and abetting it must be shown that he actually assisted another in performing a criminal act and consciously shared therein (*Nye & Nissen* v. *United States*, *supra*). There is no such proof in this record.

Who were the participants in the scheme? With whom did petitioner associate himself? With whom did he consciously share in the participation of a criminal act? Was it De Wald, as the court of appeals' opinion seems to suggest? If so, it would appear that petitioner has been convicted of a charge for which he was not indicted.*

Although the court of appeals made reference to what it considered "the strong evidence that Chason knowingly took part in the scheme to defraud", we submit that such characterization of the proof is not justified by the record.

Viewed in the light most favorable to the government, all that has been shown is that petitioner possessed and

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* De Wald was not named in the indictment as a co-defendant or as a co-conspirator (ignoring for the moment the fact that the prosecutor announced that the government was not proceeding against petitioner on the conspiracy charge).

At the time of sentence the prosecutor stated to the court that "the government has information" that De Wald is "charged with being an operator of a similar scheme in Atlanta, Georgia" but that the "government does not have information as to what Mr. De Wald's outlets were" (199a).

Clearly, therefore, a conviction of petitioner for allegedly aiding and abetting De Wald is a fatal variance from the indictment and cannot stand. The prosecutor obviously mixed up his schemes and purported proof.

sold stolen property. No *connection* was ever established between petitioner's possession and use of the airline tickets and any scheme to defraud.

The court of appeals has affirmed petitioner's conviction as an aider and abettor of unindentified participants in a mail fraud scheme to which he has not been connected. A conviction without proof of guilt of the crime charged violates due process (*Thompson* v. *City of Louisville*, 362 U.S. 199, 206).

(c)

The court of appeals infers that petitioner was a "distributor." Yet, for all that appears in the record, it is equally available to contend that he was merely a "receiver of stolen property", acting entirely for his own account and without any connection to the primary scheme.

The mail fraud statute should be strictly construed in accordance with its purposes which are to prosecute mail frauds, not state crimes where remotely or tangentially there is a legitimate mailing by someone other than the accused. The federal courts have enough to do without involving themselves in local crimes.

The instant case falls squarely within the ruling of *Kann* v. *United States*, 323 U. S. 88, where this Court stated:

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Id.* at 95.

Kann was cited with approval in *Parr* v. *United States*, 363 U. S. 370, 389-390.

However else petitioner's conduct may be characterized, one thing is clear—it was not mail fraud within the meaning of 18 U.S.C. §§ 1341, 1342.

The question whether, in the absence of a conspiracy, and individual's unexplained possession and sale of stolen property is sufficient to establish his guilt of the principal offense as an aider and abettor, is one of great importance in the administration of criminal law and warrants consideration by this Court.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted and petitioner admitted to bail pending the hearing and determination of his appeal.

Dated: New York, N. Y.
January 15, 1972.

Respectfully submitted,

ANDREW T. MCEVOY, JR.
Counsel for Petitioner

ANDREW T. MCEVOY, JR.
THOMAS R. NEWMAN
BENJAMIN H. SIFF
of counsel

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 4—September Term, 1971.

(Argued September 13, 1971 Decided November 12, 1971.)

Docket No. 71-1414

UNITED STATES OF AMERICA,

Appellee,

v.

OSCAR CHASON,

Defendant-Appellant.

Before:

KAUFMAN, ANDERSON and FEINBERG,

Circuit Judges.

Appeal from judgments of conviction following jury verdict of guilty on ten counts of mail fraud, 18 U.S.C. §1341, in the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge.*

Affirmed.

ANDREW T. McEVOY, JR., Esq., New York, N. Y. (Schulman, Abarbanel, Perkel & McEvoy, Thomas R. Newman, Esq., and Benjamin H. Siff, Esq., New York, N. Y., on the brief) *for Appellant.*

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WALTER M. PHILLIPS, JR., Assistant U. S. Attorney, Southern District of New York (Whitney North Seymour, Jr., U. S. Attorney, and Jay S. Horowitz, Assistant U. S. Attorney, Southern District of New York, on the brief) *for Appellee*.

ANDERSON, *Circuit Judge*:

Oscar Chason, a Manhattan furrier, was charged with playing a key role in a scheme to defraud two major credit card companies, Diners Club, and American Express, and was convicted on ten counts of mail fraud, 18 U.S.C. §1341. The scheme itself was rather simple. Certain persons would purchase airline tickets with lost or stolen credit cards and then pass these tickets on to Chason who either used them himself or resold them for 50 to 60 per cent of their actual value.

The appellant's first claim on appeal is that, even if he was guilty of fraud, neither the indictment nor the evidence showed that he used the mails in the execution of the scheme to the extent necessary for a violation of the federal mail fraud statute. He relies heavily upon *Parr* v. *United States*, 363 U.S. 370 (1960), and *Kann* v. *United States*, 323 U.S. 88 (1944), for the proposition that his conduct is not proscribed §1341.[1] While it is certainly true, as these cases point out, that not every tangential use of the mails in essentially local fraud cases make them into federal issues, we are satisfied that this case is within the scope of §1341.

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[1] The defendant also stresses the fact that he did not personally use the credit cards which set in motion the various mailings which formed the basis for the charges. This is, however, of little moment, for there was sufficient to convict the appellant as an aider and abettor under 18 U.S.C. §2, on which the court explicitly and correctly charged the jury.

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The testimony at trial established that whenever a credit card was used to purchase an airline ticket, several mailings took place. First the airline mailed an invoice with the amount due to the credit card company, which would in turn mail a check to the airline and also bill the owner of the card by mail. In the course of a normal legitimate transaction the card owner would then mail his check to the company. Of course, in the instances involved here, the card owners refused to pay because they had not personally used or authorized the use of their cards to buy the tickets. The testimony also revealed that in most instances the credit card company, rather than the airlines or the card owners, bore the loss from an illicit use of the cards.

The ten counts upon which the appellant was convicted were all based upon either the invoice mailings from the airlines to the credit card companies or the check mailings from the companies to the airlines. The appellant claims that these mailings had no part in the fraud scheme itself. He argues that once the tickets were procured by the improper use of the credit cards, the perpetrators of the fraud had no further interest in what happened. The mailings, for them, were simply after the fact.

Whether or not this view once could have been maintained on the basis of *Parr*, *supra*, and *Kann*, *supra*, the Court in *United States* v. *Sampson*, 371 U.S. 75, 80 (1962), made it quite plain that there is no *per se* rule that a mailing *after* a defrauder has obtained his ill-gotten gain precludes an indictment and conviction under the mail fraud statutes. The real test is the extent of the contribution which the mails make to the success of the entire scheme, *see United States* v. *Kelem*, 416 F. 2d 346, 350 (9 Cir. 1969), *cert. denied*, 397 U.S. 952 (1970). Under this test, the activity under question here clearly comes within the limits of §1341.

First, the success of this scheme depended upon the use of credit cards which, in turn, depended on the mails for their operation and use. Therefore, without the use of the mails there could have been no fraud in this case. This was the reasoning which lay behind the recent decision in *United States v. Kellerman*, 431 F. 2d 319 (2 Cir.), *cert. denied*, 400 U.S. 957 (1970), holding that a scheme to make and sell counterfeit credit cards was a violation of §1341 because the ultimate use of the bogus cards contemplated the use of the mails. This was also the rationale of the Fifth Circuit in holding that the fraudulent use of credit cards was a violation of §1341 because the use of the mails was "an incident to a material part of the scheme, *viz.* the extension of credit." *Adams* v. *United States*, 312 F. 2d 137, 140 (5 Cir. 1963); *Kloian* v. *United States*, 349 F. 2d 291, 293 (5 Cir. 1965), *cert. denied*, 384 U.S. 913 (1966).

A second important contribution which the mails made to the success of the fraudulent scheme here under consideration, sufficient to bring it within §1341, was the inherent time delay. Because the invoices had to be mailed to the credit card companies and the companies had to mail bills to the card owners before the fraud was even discovered, the time consumed helped the appellant maintain his practices longer than might otherwise have been possible and gave the ultimate holders of the tickets time to make use of them before the airlines had discovered that the tickets were worthless and had cancelled them. It was on a very similar set of facts in *Kelem*, *supra*, that the Ninth Circuit, in an opinion by Judge Ely, held the scheme to be a violation of §1341. In that case airline tickets were purchased with credit cards by various persons who never intended to pay for them, and who then sold them to the defendant Kelem for 65% of face

value. Kelem then resold them for 85% of face value. It was held that the delay in discovering the scheme, caused by the use of the mails, was sufficient for a violation of §1341. It should also be noted that the Court in *Sampson*, *supra*, found the necessary use of the mails in a fraud scheme where letters were sent simply to lull fraud victims into thinking that they had not been defrauded. The delay in finding out about the fraud, caused by these letters, was sufficient to create a §1341 violation, *see also United States* v. *Eskow*, 422 F. 2d 1060 (2 Cir.), *cert. denied*, 398 U.S. 959 (1970).

Finally, a third use of the mails in this case which violated §1341 derived from the fact that it was not the airlines, but the credit card companies, who were actually defrauded. The use of the mails in sending the invoices to the companies and in receiving the checks sent by them was clearly an essential step in this fraud, *see Adams*, *supra*, at 140.

As a final point, it should be noted that our construction of §1341 in no way violates the theory behind this federal statute that local fraud cases should be prosecuted by state authorities. This fraud scheme allegedly involved numerous persons in many states. Just the mailings charged in the indictment went between the States of Florida, Georgia, New York and Massachusetts. Local law enforcement officials would be hard put to cope with such fraudulent practices on their own and the use of federal criminal law is proper and appropriate.

The second of the appellant's claims is that the trial court committed error in excluding certain evidence which he offered. Chason's trial defense relied primarily on the issue of intent. He never denied having, using, or selling the airline tickets, but he did claim that his possession of them was in good faith.

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He testified at trial that he purchased most of the tickets from Ken DeWald, although he also received some of them in partial payment for a coat from Elmer Dudley. Chason claimed that DeWald told him that the tickets came from two sources. One was from salesmen who had credit cards and needed ready cash: they would buy the tickets on credit and then sell them to DeWald at less than half-price. The salesmen would then have the use of the money until their credit card bills became due. The other source was from advertising agencies which received tickets as payment from the airlines for advertising time. In both cases, DeWald had the connections to get the tickets from the salesmen and the radio and television personnel.

Chason further testified that he either used the tickets himself or sold them at his cost (50% of face value) to friends and customers as a favor, that he made no money on any of the resales, and that until just before he was arrested, he never knew that there was anything wrong with the tickets.

At the trial, to prove that he had no fraudulent intent he offered the testimony of one Gordon who took the witness stand and said that he was in the fur manufacturing business, that he had known the appellant for some twelve years, and that one day he was in Chason's place of business where he overheard a certain conversation between Chason and DeWald. The Government objected to Gordon's testifying to the substance of this conversation on the ground of hearsay. The court sustained the objection. The defendant then made an offer of proof to the effect that Gordon would testify that he heard DeWald tell Chason how DeWald was able to get airline tickets very cheaply, and that DeWald told Chason that the sources of the tickets were the same, in substance, as that described in Chason's own testimony.

The defendant argued then, as he does now on appeal, that this testimony was admissible under the state of mind exception to the hearsay rule.

We have no doubt that the testimony should have been received for the limited purpose for which it was offered. Gordon's testimony concerning what DeWald said to Chason was not offered to show where DeWald actually got the tickets but to show where Chason thought he got them. As testimony going to the issue of good faith, it was admissible, *see United States v. Press*, 336 F. 2d 1003, 1010-12 (2 Cir. 1964), *cert. denied*, 379 U.S. 965 (1965); VI J. Wigmore, *Evidence*, §1789, at 235 (3rd ed. 1940); C. McCormick, *Evidence*, §225, at 460-61 (1954).

There remains to be decided whether or not this error requires a new trial. A careful study of the trial transcript shows that it does not.

Rule 52(a), F. R. Crim. P., provides that any error "which does not affect substantial rights shall be disregarded." The Court in *Chapman v. California*, 386 U.S. 18, 24 (1967), stated that error is harmless if the court is "able to declare a belief that it was harmless beyond a reasonable doubt."[2]

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[2] Because we are convinced that the error here was harmless, even under the *Chapman* test, we are not called upon to decide whether or not a lower standard could be applied to Rule 52(a) error, see *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946). Although the Ninth Circuit has clearly said that a lower standard can be applied to non-constitutional error, *Isaac v. United States*, 431 F.2d 11, 15 (9 Cir. 1970), our court has on occasion intimated that the *Chapman* test is to be used as the Rule 52(a) test as well, see, *e.g.*, *United States v. Siracusano*, 421 F.2d 1206, 1208 (2 Cir. 1970).

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By necessity, therefore, we are called upon to look closely at what possible harm could arise from the exclusion of evidence and to look at the entire record to ascertain what affect this error might have had on the verdict. Of course, we do not know the thoughts of the jurors who sat, so we must base our judgment on the probable impact of the omitted testimony on the minds of the average jury, *see Harrington v. California*, 395 U.S. 250, 254 (1969). Merely having sufficient evidence to convict does not make error harmless, but overwhelming evidence pointing towards guilt and the lack of a strong defense are factors to be considered in making the determination, *see United States v. Nasta*, 398 F.2d 283, 285 (2 Cir. 1968); *see also United States ex rel. Satz v. Mancusi*, 414 F.2d 90, 92 (2 Cir. 1969); *United States v. Tucker*, 415 F. 2d 867, 870 (2 Cir. 1969), *cert. denied*, 397 U.S. 955 (1970).

There must first be considered the greatest possible value that the omitted testimony could have had for the defendant. Here even though the evidence did go to the crucial issue of good faith, it could really establish no more than a very narrow point. At best, Gordon's testimony would show that Chason, on one occasion out of the several times they met, heard DeWald give a certain explanation for the source of the airline tickets. Therefore, even assuming that the jury had heard and fully believed Gordon's testimony, we are convinced beyond a reasonable doubt that their verdict would not have changed.

For one thing, it is quite possible on the basis of Chason's own testimony, that the jury already believed that he had heard this story from DeWald but the jury then chose to give it little weight in light of the other evidence.

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At the very best, Chason's story was one to stretch the credulity of the jury. Here was a successful businessman claiming that he found nothing unusual in salesmen buying airline tickets on credit and then selling them at half price so that they could have quick cash. Yet, even if the bill did not become due for six months this would be an interest rate of some 200%. No more believable was Chason's reliance on the story that he could get the tickets cheaply because the airlines paid for radio and television advertising with them. Furthermore, this was not just a quick resale of several tickets, for by his own admission, Chason sold over a hundred tickets to just one person. In addition, each of the tickets carried on its face an imprint of a credit card belonging to some third party. Another piece of evidence which discredited Chason's testimony that he had no idea that the tickets were "tainted" was his own admission that prior to the time that he was buying tickets from DeWald, he had once bought some tickets from a friend which turned out to be void because they had been purchased on an expired credit card. Though he had been told this by an agent of Eastern Airlines, Chason used them just the same.

Chason also testified that DeWald, his chief supplier of tickets, was "an operator that has connections where he makes a living that way." Chason did not know the occupation of Dudley, the other source of the tickets, but Chason did say that he knew that Gil Beckley, the man who introduced both DeWald and Dudley to Chason, was a bookmaker.

There were also inconsistencies between Chason's own testimony and that of other witnesses that could well have persuaded the jury to discount anything which Chason

said. For example, Chason testified that DeWald always personally brought the tickets to him at his place of business. Jerome Zwerdling testified that Chason received at least some tickets from DeWald in the mail.[3]

Finally, there was testimony by two Diner's Club security officers, present when Chason was arrested, that he offered each of them a bribe if they would "help him out." Although Chason disputed this testimony, the jury may well have felt that an attempted bribe at that point manifested Chason's guilty knowledge.

Therefore, in light of the strong evidence that Chason knowingly took part in this scheme to defraud and in light of the fact that the excluded testimony by Gordon would have been of slight help to him, we conclude that the error was harmless beyond a reasonable doubt.

We have considered each of the remaining points but they do not have sufficient merit to call for comment.

Affirmed.

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[3] This mailing was not one of those charged in the indictment.

APPENDIX B

71-1414

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GILBERT BECKLEY, *et al.*,

Defendants,

OSCAR CHASON,

Defendant-Appellant.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant Oscar Chason,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN
Irving R. Kaufman

Appendix B

ROBERT P. ANDERSON
Robert P. Anderson

WILFRED FEINBERG
Wilfred Feinberg
U.S.C. JJ.

December 20, 1971

APPENDIX C

Statutes Involved

Title 18 United States Code:

§ 1341. Frauds and swindles

Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated, or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

§ 1342. Fictitious name or address

Whoever, for the purpose of conducting, promoting, or carrying on by means of the Post Office Department of the United States, any scheme or device mentioned in section 1341 of this title or any

other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 9 1972
MICHAEL RODAK, JR., CLERK

No. 71-935

In the Supreme Court of the United States

OCTOBER TERM, 1971

OSCAR CHASON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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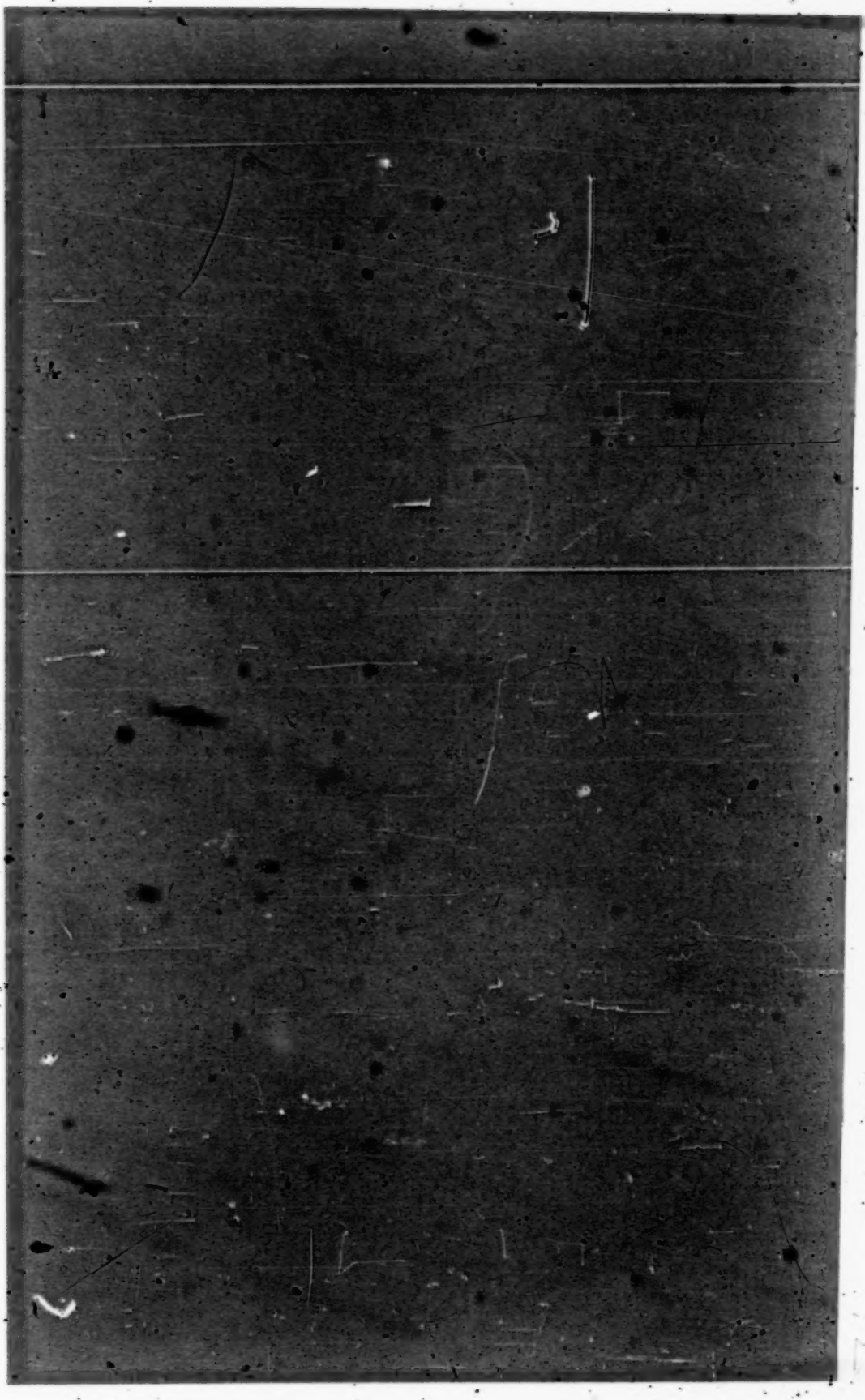

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1971. A petition for rehearing was denied on December 20, 1971. The petition for a writ of certiorari was filed on January 17, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

ISSUES PRESENTED

1. Whether the evidence was sufficient to show petitioner's connection with the scheme to defraud.

2. Whether the court of appeals erred in finding that the exclusion of certain testimony was "harmless error."

3. Whether petitioner was denied the effective assistance of counsel because, unknown to him, his attorney was under indictment in the same district at the time of his trial.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on ten counts charging him with mail fraud, in violation of 18 U.S.C. 1341 (Tr. 266).[1] He was sentenced to a term of imprisonment of nine months on each count, the sentences to run concurrently (III R. 14). The court of appeals affirmed (Pet. App. 1a-10a).

The evidence revealed that in 1968 and 1969 petitioner, a fur dealer, sold airline tickets at one-half their face value. These tickets had originally been purchased through the use of lost or stolen credit cards issued by American Express or Diner's Club (see, *e.g.*, Tr. 17-20, 23-25, 29-32, 48-50, 52, 56, 59-61, 145-148, 162, 217). Three persons, William Heiberger, David Ampel, and Morey Herzog, testified to

[1] "Tr." refers to the trial transcript, a copy of which we are lodging with the Clerk of this Court. Already on file is a three volume record, hereinafter "R."

having bought tickets from petitioner on several occasions. Petitioner told Heiberger and Ampel that the tickets were obtained from people in the fur industry who were in need of money which they could not get through regular channels (Tr. 34, 36, 52).

Petitioner testified that he never realized that the tickets he received and sold were purchased with stolen credit cards (Tr. 168). Most of the tickets he purchased from one Ken DeWald, whom petitioner described as an "operator" from Atlanta, Georgia (Tr. 165, 180-181, 183-184). Petitioner had been introduced to DeWald by Gil Beckley,[2] known to petitioner as a bookmaker (Tr. 165, 182). Petitioner testified that DeWald told him that the tickets came from two sources: (1) salesmen who, in need of cash, purchased the tickets with their own credit cards and then sold them; and (2) advertising brokers who received tickets from airlines in payment for radio and television advertising time (Tr. 165-167).

As part of his defense, petitioner offered the testimony of one Moe Gordon to the effect that Gordon had once overheard DeWald offer petitioner some airline tickets and explain to petitioner that he got them from salesmen who needed ready cash and from advertising agencies which were paid with tickets by various airlines for advertising time (Tr. 155-156). Although the testimony was offered to establish petitioner's state of mind (Tr. 156), it was excluded as hearsay (Tr. 154-156). The court of appeals, while

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[2] Beckley is named as a defendant in the indictment under which petitioner was tried, but was a fugitive at the time of trial.

holding that the exclusion was error, found it to be harmless (Pet. App. 7a-10a).

ARGUMENT

1. The evidence adduced at trial was sufficient to implicate petitioner in the scheme to defraud. The jury could reasonably have rejected petitioner's contention that he, an experienced businessman, had engaged in the numerous dealings over a two-year period, believing that airlines paid for advertising time with tickets bearing the imprint of a credit card belonging to some third person (Tr. 101-103), or that salesmen would buy tickets on credit and sell them at less than full price, incurring the equivalent of enormous interest charges (see Pet. App. 9a).

Other evidence also negates petitioner's assertion that he had no idea how the tickets were purchased. Prior to buying tickets from DeWald, petitioner had bought some tickets from a friend which were void because purchased on an expired credit card. Although he had been informed of this fact by an airline agent, petitioner had used them anyway (Tr. 211-212). Furthermore, petitioner testified that the first time he realized that there was something wrong with the tickets was when one Jerome Zwerdling, to whom he had sold tickets, was arrested (Tr. 173). Zwerdling was arrested on May 18, 1969 (Tr. 221). At the time of petitioner's arrest, almost three months later, petitioner had in his possession a number of airline tickets obtained with lost or stolen credit cards (Tr. 97-99, 101-103). There was also

testimony that at the time of his arrest petitioner offered a bribe to two Diner's Club security officers if they would "help him out" (Tr. 104, 136-137).

The fact that there was no evidence that petitioner either procured the credit cards or initially purchased the airline tickets is no barrier to a finding that he knowingly participated in the scheme to defraud. See *United States* v. *Kelem*, 416 F. 2d 346 (C.A. 9), certiorari denied, 397 U.S. 952. Nor is there any merit to petitioner's contention that his conviction was invalid since all the participants in the scheme to defraud, which petitioner does not deny was shown to exist (Pet. 17), were not identified. Cf. *Hendrix* v. *United States*, 327 F. 2d 971, 975 (C.A. 5).

2. In light of the substantial evidence of petitioner's guilt, the court of appeals did not err in ruling that the exclusion of Gordon's testimony was harmless error. As the court below noted (Pet. App. 8a), the most that Gordon's testimony would have established is that once during a two-year period DeWald gave petitioner a certain explanation for the source of the tickets. While this evidence would have provided some corroboration for petitioner's assertion [3] that he was unaware that the tickets were obtained through the use of lost or stolen credit cards (Tr. 165-167), it is most unlikely that the evidence, even if believed,

[3] Petitioner had not yet testified when Gordon was offered as a witness. After the defense rested, however, he made a motion to reopen and took the stand. That his testimony was not compelled by the exclusion of Gordon's testimony is evidenced by his counsel's statement at the time of the motion that petitioner "has always wanted to take the stand" (Tr. 160).

would have led the jury to reject the other evidence of petitioner's fraudulent intent and change its verdict. There is no rule, as petitioner contends, that the harmless error doctrine cannot be applied to the exclusion of evidence bearing on intent. While *United States* v. *Schultz*, 235 F. 2d 684 (C.A. 7), relied on by petitioner (Pet. 13), held that it was reversible error to exclude evidence going to intent, that ruling was based on "the circumstances of this case." 235 F. 2d at 685.

3. During trial, petitioner was represented by Edmund Rosner (Tr. 1). Unknown to petitioner, Mr. Rosner was at that time under indictment in the Southern District of New York for subornation of perjury and conspiracy.*

Petitioner asserts that Mr. Rosner's indictment necessarily created a conflict of interest and prevented Rosner from effectively representing petitioner. The record, however, reveals that petitioner was vigorously and competently represented, with particular emphasis being placed on the contention that petitioner lacked any fraudulent intent. Other aspects of the defense were also fully pursued. Prior to trial, counsel filed motions requesting a bill of particulars and for discovery and inspection (I R. 8, 10). A pretrial hearing was held on counsel's motion to suppress the airline tickets seized at the time of the petitioner's arrest (II R.). At trial, counsel entered frequent ob-

* That indictment was dismissed on January 24, 1972, for failure to prosecute; the government has filed a notice of appeal.

jections and conducted careful cross-examinations (see, *e.g.*, Tr. 30, 37-42, 50-51, 56-57, 106-112, 118). Counsel objected to testimony concerning statements in regard to a bribe at the time of petitioner's arrest and conducted voir dire examinations into the circumstances surrounding the making of the statements (Tr. 67-93, 117-135). In short, petitioner was fully and competently represented.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
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Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT E. LINDSAY,
Attorneys.

MARCH 1972.

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